Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88-1432

In The

Supreme Court of the United States

October Term, 1988

MARIA ESPARZA, et al.,

Petitioners,

v.

RUBEN VALDEZ, Executive Director,
Colorado Department of Labor, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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1. Contrary to the suggestion made by the respondent state officials, this case is not, nor is it likely to become, moot.

With the benefit of briefing by the parties on the specific question of mootness, the Tenth Circuit has already concluded that this case is not moot with regard to the outstanding claims for retroactive relief. See, Petition for Certiorari at 13a n.4. Before this Court respondents equivocate, as they did before the Tenth Circuit, and cannot state that they will satisfy the outstanding claims of the named petitioners and the class they represent.

Even if respondents, in the wake of the Petition for Certiorari, at this late date attempt to moot the case by satisfying the claims of what they refer to as "identified" class members, Brief in Opposition to Certiorari at 7, a live controversy continues. Respondents have not indicated any intention to afford relief to all class members, whose identities are uniquely within their control. As the Tenth Circuit was well aware, even though the claims of the individual named plaintiffs may be mooted by administrative action of the defendants, the case may proceed as a class action if the district court denied certification of a "certifiable" class for an inappropriate reason. See, e.g., *Reed v. Heckler*, 756 F.2d 779, 785-86 (10th Cir. 1985). That is precisely what happened in this case, since the district court improperly dismissed petitioners

§ 1983 claims on "exhaustion of state administrative remedies" grounds, contrary to the clear rule of *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S.Ct. 2557 (1982). See, Petition for Certiorari at 7.

Since this case is not moot and review has been properly sought before this Court, the case should be decided. See, *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 204, 89 S.Ct. 361, 364 (1968).

2. Petitioners also call to the attention of this Court three recent circuit court decisions evidencing further the split among the circuits on the issues relevant to this case. See, *Bennett v. White*, 865 F.2d 1395, 1407-08 (3rd Cir. 1989) (Eleventh Amendment does not bar retroactive payment of wrongfully withheld child support payments collected by state pursuant to Title IV of the Social Security Act); *Robinson v. Block*, 869 F.2d 202, at n.11 (3rd Cir. 1989) (because program is not funded by state monies, Eleventh Amendment does not bar retroactive payment of wrongfully withheld food stamp benefits); *Cotton v. Mansour*, 863 F.2d 1241, 1250 (6th Cir. 1989), rehearing denied, March 20, 1989 (notwithstanding that food stamps are federally funded program, Eleventh Amendment bars retroactive payment of wrongfully withheld benefits because implementation of such relief would require ancillary expenditures from state treasury).

Counsel for plaintiffs in *Cotton v. Mansour, supra*, Terri L. Stangl, Legal Services of Eastern Michigan, Saginaw, Michigan, has advised petitioners that the *Cotton* plaintiffs intend to file in this Court a petition for writ

of certiorari specifically challenging the Sixth Circuit judgment barring retroactive relief on Eleventh Amendment grounds.

Respectfully submitted,

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